IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.291 OF 2007
WITH
CIVIL APPLICATION NO.1031 OF 2007

Damu Hari Gavali & Ors. ..Appellants.

V/s.

Babu Hari Gavali & Ors. ..Respondents.

Mr.Vinod Shah for appellants.

Mr.M.M.Sathaye for Respondent Nos.1(A),1(C),1(D), 1(E) & 1(F).

CORAM: A.M.KHANWILKAR,J

DATE : AUGUST 9, 2007.

P.C. :

1. Heard counsel for the parties.

2. Pursuant to the liberty given to the Appellants, as recorded in the Order dated July 24, 2007, the Appellants have amended the Appeal Memo asserting that the finding recorded by the Appellate Court in paragraph-24 of the impugned judgment to the effect that the Appellant had "admitted" that the suit land was cultivated by two persons as tenants in respect of the Joint Family property is manifestly wrong. To support this submission reliance is placed on the evidence of Kisan Damodar Gavali.

3. Counsel for the Respondents fairly submits that the evidence of Kisan Damodar Gavali nowhere concedes the position that the suit land was cultivated for and on behalf of the Joint Hindu Family.

4. However, Counsel for the Respondents would rightly submit that the Courts below have considered other materials to form the view that the suit land was under cultivation for and on behalf of the Joint Hindu Family. The trial Court in paragraph-14 of the Judgement has adverted to the evidence produced on behalf of the Respondents in the shape of 7/12 extract from year 1939-40 onwards. From the entry for the year 1943-44 it is seen that the Murlidhar Hari was cultivating the suit lands and in the year 1944-45 Hari Punja was cultivating suit lands. Thereafter since 1945-46 Damu Hari started cultivating the same. The fact that such entries existed in the village record is not in dispute. The entries in the 7/12 extract would raise presumption with regard to the factum of possession and cultivation by the stated person.

5. Counsel for the Appellants however, contends that the presumption has been rebutted by the

Appellant by producing cogent evidence of Kabulayat. Reliance placed on the Kabulayat by the Counsel, overlooks the fact recorded by the Lower Court that this Kabulayat is not proved in evidence and has not been exhibited. Besides, mere production of Kabulayat is not enough to doubt the fact that the lands were cultivated from 1939-40 originally by Murlidhar Hari, followed by Hari Punja and later on by Damu Hari. That circumstance presupposes that the agricultural activities on the suit lands was done for and on behalf of the Joint Hindu Family. The circumstance that certificate under section 32(M) of the Bombay Tenancy & Agricultural Lands Act has been issued in favour of the Appellants by itself is not enough especially in the light of the finding of fact that the suit Lands were cultivated all along for and on behalf of the joint Hindu Family.

6. Suffice it to observe that all these aspects and other matters have been considered by the two Courts below and finding of fact has been reached by the Appellate Court to the effect that the suit lands formed nucleus of the Joint Hindu Family property. That finding of fact will bind this Court. It is not open to this Court in exercise of Second Appeal, to reappreciate the evidence on record and take a

different view merely because some other view was possible.

7. In the circumstances, no case for interference in exercise of Second Appeal is made out. No substantial question of law arises for consideration. Hence dismissed.

8. In view of the Order passed in the Appeal, nothing survives in Civil Application, the same is disposed of accordingly.

9. At this stage, counsel for the Appellants submits that the Appellants are interested in carrying the matter in Appeal against this decision, for which reason execution of the decree be stayed for some time. As two Courts have already held against the Appellants, ordinarily, question of grating such indulgence does not arise. Even so, it is ordered that execution of the decree be kept in abeyance for a period of four weeks from today, "in relation to the agricultural lands only".

(A.M.KHANWILKAR,J)